Office-Supreme Court, U.S.
FILED
JUL 2 1981

No. 80-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS B. DEWOLF
DEWOLF, WARD & MORRIS, P.A.
1475 Hartford Building
200 East Robinson Street
Orlando, Florida 32801
(305) 841-7000

Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

RESPONDENT'S STATEMENT OF THE QUESTION PRESENTED

Respondent believes that the real question presented here is whether the U.S. District judge conducting the trial, in granting a Directed Verdict in favor of the Respondent (Defendant below) at the close of the Petitioner's (Plaintiff below) case and the Court of Appeals for the Fifth Circuit, in affirming the Order Granting Directed Verdict, so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

Petitioner's statement of the question presented contains a lengthy recitation and characterization of the evidence presented at the trial. The statement of evidence contains inaccuracies and omissions which renders the recitation of evidence misleading. Respondent therefore feels compelled to correct some of those inaccuracies and omissions.

The conveyance to a third party referred to in subparagraphs (c), (d) and (f) under "Petitioner's Statement of the Question Presented" was not a full conveyance since the deed was held in escrow to be delivered only upon the exercise of the option which could only take place after the construction mortgage of Sackman-Gilliland was due in October of 1973. It did not diminish the mortgagee's security since the entire arrangement was subject to the first lien of the construction mortgage and the borrower, Vacation Concepts and William Patterson, had full control of the property for purposes of constructing and operating the project. The transaction involved 3.5 acres of a total 87 acre tract and was the site of one of the two motels to be constructed as part of the project. The interest of the optionee was eliminated in

the foreclosure proceeding and was never a factor in the borrower's default or in the value of the property acquired by foreclosure.

Sackman-Gilliland's right to declare a default as referred to in sub-paragraph (g) of the Petition was subject to the terms of the Building and Loan Agreement, which granted the borrower the right to remedy any default, even if the transaction did constitute a default. The statement in sub-paragraph (h) that the borrower defaulted in the payments on the loan is inaccurate. The loan required no payments until the construction loan was due in September of 1973, and the default claimed was in the payment of interest in March of 1973. The default occurred because Sackman-Gilliland Corporation ceased funding the loan and thereby ceased paying itself the interest which it was paying under each construction draw.

The statement in sub-paragraph (h) of the Petition that the project, during the foreclosure period suffered extensive deterioration requiring an expenditure of an additional $1,400,000.00 by Sackman-Gilliland Corporation is inaccurate and misleading. During the entire course of the foreclosure the project was open for business and was being operated and managed by Mr. Stanley Kreitman, who had been hand picked to succeed to the interest of the borrower. The $1,400,000.00 referred to in sub-paragraph (g) of the Petition was advanced after the foreclosure was completed, by Sackman-Gilliland Corporation, to the Kreitman group to complete construction of the amenities and to convert the project from a motel and campground into the elaborate facilities of "Orlando Tennis World."

The statement in sub-paragraph (i) that Sackman-Gilliland Corporation was unable to find a buyer who would agree to purchase the property for less than 100% financing, etc. is misleading in that the evidence does not show any effort by Sackman-Gilliland Corporation to find a buyer or even to place the property on the market for sale. After foreclosure the evidence shows that Sackman-Gilliland Corporation converted its arrangement with Mr. Kreitman into a new arrangement under which Sackman-Gilliland Corporation would participate in any operating profits, any profit upon sale of the premises or any excess funds through refinancing.

Respondent contests the statement in sub-paragraph (j) of the Petition that Sackman-Gilliland Corporation suffered the losses set forth therein as a result of misrepresentation on the part of Chelsea Title and Guaranty Company. The evidence clearly shows that the failure to report the Howe transaction in the endorsements to the title policy did not result in any damage to Sackman-Gilliland Corporation and there was a complete failure of evidence to show any damage to Sackman-Gilliland Corporation as a result of the Howe transaction.

TABLE OF CONTENTS

PAGE

RESPONDENT'S STATEMENT OF THE QUESTION PRESENTED . i

TABLE OF AUTHORITIES v

REASON FOR DENYING THE PETITION 1

STATEMENT OF THE CASE 3

ARGUMENT 8

The Trial Court's Grant Of A Directed Verdict Under rule 50(a) F.R.C.P., Was Correct And Is Not Such A Serious Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: PAGE

Aldon Ind. Inc. v. *Don Meyer & Assocs.*, 517 F.2d 188 (5th Cir. 1975) 10

Ballard v. *Krause*, 248 So.2d 233 (Fla. 1909) 10

Boeing v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) 2

Brady v. *Southern Railroad*, 320 U.S. 476 2

City Building Corp. v. *Farish*, 292 F.2d 620 (5th. Cir. 1961)..... 9, 10

City of Sanford v. *Ashton*, 131 Fla. 759, 179 So. 765 ... 10

Day v. *Avery*, 548 F.2d 1018 (D.C. Cir. 1976) 8

Evans v. *Gray*, 215 So.2d 40 (Fla. 3d DCA 1968)..... 8

F & B Cedo, Inc. v. *Galaxie Studios, Inc.*, 201 So.2d 597 (Fla. 3d DCA 1967) 10

Hall v. *Western Union Tel. Co.*, 51 So. 819 (Fla. 1910) . 10

Meyerson v. *The Lawyers' Title Insurance Corp.*, 333 N.Y.S. 2d 33 (1972)..... 8, 9

Nationwide Mutual Insurance Co. v. *Griffin*, 222 So.2d 754 (Fla. 4th DCA 1969) 10, 11

Peter Marich & Assocs. Inc. v. *Powell*, 365 So.2d 754 (Fla. 2d DCA 1978)..... 11

Provident National Bank v. *Thunderbird Assocs.*, 364 So.2d 790 (Fla. 1st DCA 1978) 9

Pryor v. *Oakridge Dev. Corp.*, 119 So. 326 (Fla. 1928).. 8

Sutton v. *Gulf Life Insurance Co.*, 189 So. 828 (Fla. 1939) 8

Williams v. *Atlantic Coastline R.R. Co.*, 48 So. 209 (Fla. 1909)..... 10

MISCELLANEOUS:

RESTATEMENT (SECOND) OF TORTS, §548A (1977)..... 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2063

SACKMAN-GILLILAND CORPORATION, *Petitioner,*

v.

CHELSEA TITLE AND GUARANTY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

In granting the Motion for Directed Verdict at the close of the Plaintiff's case, the trial judge did not depart from the accepted and usual course of judicial proceedings. Therefore, the Petition for Writ of Certiorari should be denied.

The trial judge carefully considered the evidence presented by the Plaintiff, Sackman-Gilliland Corporation (SG), in the light most favorable to the Plaintiff.

He considered the Motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure and in accordance with the legal authorities which provide guidelines for the determination of a motion for directed verdict. The court's comments, which were recorded in the transcript, were as follows:

> "THE COURT: All right, the Defendant's Motion for a directed verdict is granted because the evidence presented by Sackman-Gilliland is insufficient to establish a prima facie case under the evidence and the applicable law.
>
> Now, when viewed in the light most favorable to the Plaintiff the evidence completely fails to support the claim for damages." (T[2]-308 to 309).

After considering the record, the briefs of the parties and argument of counsel, the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the trial judge in a per curiam Order dated March 18, 1971.

The trial judge's Order Granting Directed Verdict correctly applied the law to the evidence in this case. Considered in the light of the authority set out in *Brady* v. *Southern Railroad*, 320 U.S. 476, and *Boeing* v. *Shipman*, 411 F.2d 365 (5th Cir. 1969), the evidence adduced by SG has failed to establish a case for two reasons: (1) The evidence clearly shows that the matter allegedly misrepresented (that is the Howe option transaction) did not cause SG any loss or injury whatever; and (2) The evidence proffered by SG as to its damages was so remote, speculative and irrelevant as to be inadmissible under the rules of evidence.

STATEMENT OF THE CASE

Respondent disagrees with a number of the statement of facts set forth in the Petitioner's Statement of the Case and will therefore set forth those most significant statements which require correction.

1. On page 3 of the Petition, Petitioner states "accordingly, SG was not allowed to introduce any damage testimony." This statement is not quite correct. The correct statement would be that SG elected to rely on the proffer of testimony and did not offer into evidence any other damage testimony. The Court held that the damage testimony proffered was inadmissible. (T[2]-287 to 288).

2. Petitioner's statements on pages 4 and 5 of the Petition concerning CT's involvement in the mortgage loan closing imply that CT was participating in the closing in some capacity and agreed to certain undertakings. This is inaccurate. SG dealt with H. Knox Bettinghaus, Esquire, as attorney for the Borrower, throughout the negotiations for the loan and during the loan closing. CT's only involvement occurs because Mr. Bettinghaus was an agent of CT for purpose of writing title insurance binders and title insurance policies, pursuant to an agency agreement. CT's only agreements are those set forth in the title insurance binder and the mortgagee title insurance policy actually issued in its name by Mr. Bettinghaus to SG. The letter of June 30, 1972, referred to on page 5 of the Petition actually sets forth instructions to Mr. Bettinghaus, as attorney for the Borrower, concerning disbursements of funds and also instructed him, as a condition to closing the loan, as follows:

> "5. That you are prepared to furnish the Lender with written continuations of the status of title not less than once a month when request is made by the

> Borrower, Vacation Concepts, Inc., for an advance pursuant to the Building and Loan Agreement executed by the Lender and Borrower. Such continuations, it is to be acknowledged, are to be insured by the title company, Chelsea Title & Guaranty Company."

3. The letter also contains other instructions to Mr. Bettinghaus, as attorney for the Borrower, concerning the payment of taxes, the payment of outstanding mortgages and recording of the documents. The letter contains the paragraph:

> "Per our agreement, you are to telephone me Wednesday, July 5, 1972, to advise me whether the aforementioned conditions precedent can be accomplished and on your assurance, I will arrange for the release of the monies under the payment authorization executed by your clients." (Exhibit 18)

Mr. Bettinghaus complied with the terms of the letter and did issue a CT mortgagee title insurance binder and policy insuring the first lien status of the SG mortgage. He complied with the requirement of issuing continuations of the status of title by forwarding to SG, upon request, when each construction draw was due, an endorsement to the title policy which simply stated: "The effective date of this policy is amended to read _____", using the date of each construction draw.

4. On page 6 of the Petition SG uses a sub-heading: "The Borrower's Conveyance to a Third Party of SG's Mortgaged Security." This heading is misleading and SG's statement of facts concerning the Howe transaction incorrectly omits a number of pertinent facts. The Howe transaction was structured by Mr. Bettinghaus (the Borrower's attorney) so that it would not constitute a conveyance until after the SG mortgage was to have been paid. (Exhibit 72) The warranty deed executed by the

Borrower to Howe was placed in escrow with Lenore Industries, Inc., pursuant to an escrow letter dated July 12, 1972, (Exhibit 63) to be delivered to Howe only upon the exercise of the option (between October 1 and October 15, 1973).

5. On page 6 of the Petition SG states:

> "On July 13, 1972, CT was informed of the Howe transaction by letter from its agent, Bettinghaus, enclosing copies of the CT title insurance binder he had issued to Howe covering said 3.5 acres, dated July 10, 1972 (SG-61), a binder endorsement and CT's premium fee for the Howe title insurance."

This statement seems to imply that the CT regional office was aware that the Howe title policy and the SG mortgage title policy were somehow related. There is no evidence in the record to indicate that the CT home office or regional office had any reason to know that the two policies were related to the same project.

6. This same implication appears on page 7 of the Petition by insertion of "(SG)" in the quoted portion of the letter from Bettinghaus to the CT home office dated July 10, 1973. This parenthetical reference does not appear in the letter and was supplied by SG in the petition.

7. On page 11 of the Petition under sub-paragraph (g) "The Foreclosure," SG refers to the foreclosure judgment "in the amount of $3,586,727.00." Actually the foreclosure judgment was never offered in evidence by SG and it is not a part of the record in this case. There is no testimony in the record that Respondent can find that even refers to the amount of the foreclosure judgment.

8. SG also states:

> "SG's bid was $3,000,000.00 (T[2]-129 to 130), though the property was of much less value due to the deep real estate depression at that time."

There is no evidence in the record as to the market value of the property in September of 1974, and no basis for any presumption that the property was worth less than $3,000,000.00, which was the amount of the SG bid.

9. SG's reference to Internal Revenue Service rules creating potentially severe tax consequences for mortgagees acquiring property with a bid significantly less than the amount loaned, is also an incorrect statement. According to the legal opinion quoted by the witness, Neil Mangot, (T[Vol. L]-132 to 133) SG would have a tax problem only if, and to the extent that, the amount of its bid was less than the fair market value of the property at the time of the foreclosure sale. If SG actually considered that the fair market value of the property at the time of the sale was less than $3,000,000.00, say, $2,000,000.00, then it could have bid $2,000,000.00 and not had a tax problem. It could also have saved a considerable sum in documentary tax stamps. After the foreclosure sale the property was placed on SG's books at a value of $3,000,000.00. Actually, there was no appraisal offered in evidence as to the value of the property in September of 1974, the time of the foreclosure sale. There is no reason to believe from the evidence that the property, the construction of which was substantially complete, and which had been appraised when the loan was originated at in excess of $5,000,000.00 upon completion, was worth less than $3,000,000.00 in September of 1974.

10. SG's statements beginning on page 11 of the Petition under the sub-heading: "SG Efforts to Salvage the Investment and Its Damages" is based on the proffered testimony of Neil Mangot, which proffer was rejected by the Court and the testimony held to be inad-

missible. All objections to the testimony were reserved until the proffer was concluded and the Court ruled on CT's objection to the proffer before any cross-examination of the witness was undertaken. Aside from questions as to the lack of foundation for the summary testimony given by the witness, Neil Mangot, it is clear that the testimony relates to transactions occurring after SG acquired the property in the foreclosure sale in September of 1974. The testimony deals with SG's sale of the property to the Kreitman group in December of 1974, its loan to the Kreitman group of additional sums over a period of four years totalling $1,400,000.00 and the ultimate sale of the Kreitman mortgage to a creditor bank in reduction of debt. Following this proffered testimony, the Court ruled that the testimony was inadmissible as proof of damages because it was too remote and speculative and not related to the alleged misrepresentation.

11. The essential facts as to SG's claim for damages are:

a. SG advanced $2,255,000.00 to Vacation Concepts, Inc. under the construction loan after the date of the Howe option transaction.

b. SG foreclosed on this mortgage and was awarded a final judgment establishing that it had a first lien on the mortgage property. The interest of Howe was foreclosed on default and did not cause any loss or damage to SG.

c. SG acquired the property at the foreclosure sale based on a bid of $3,000,000.00, which sum was as much or more than it had invested in the mortgage.

ARGUMENT

The Trial Court's Grant Of A Directed Verdict Under Rule 50(a) F.R.C.P., was Correct And Is Not Such A Serious Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In ruling on the Defendant's Motion for Summary Judgment at the close of the Plaintiff's case the Court stated that the evidence, when viewed in the light most favorable to the Plaintiff, did not support the Plaintiff's claim for damages.

SG's case as to liability failed because even if there was sufficient evidence of the alleged fraudulent misrepresentation to go to the jury, it is still clear that the matter allegedly misrepresented was not material to SG's claim of loss. No evidence was presented that the Howe option transaction caused SG any loss whatsoever. A misrepresentation is actionable only if the Plaintiff's claim of loss arose out of the matter misrepresented. *Day* v. *Avery*, 548 F.2d 1018 (D.C. Cir. 1976); *Sutton* v. *Gulf Life Insurance Co.*, 189 So. 828 (Fla. 1939); *Pryor* v. *Oakridge Dev. Corp.*, 119 So. 326 (Fla. 1928); *Evans* v. *Gray*, 215 So.2d 40 (Fla. 3d DCA 1968); RESTATEMENT (SECOND) OF TORTS, §548A (1977).

SG's reliance on the case of *Meyerson* v. *The Lawyers' Title Insurance Corp.*, 333 N.Y.S. 2d 33 (1972) is misplaced. The *Meyerson* case actually illustrates the essential elements necessary for recovery for misrepresentation which are lacking in the case sub judice. The *Meyerson* suit was based on misrepresentations as to the condition of title to real estate, and was brought in tort of necessity because no title insurance policy was ever issued. An attorney, who was an agent for policy writing purposes, of Lawyers' Title rendered a report of title to

a prospective mortgage lender in which he specifically stated that taxes on the property to be mortgaged had been paid and that the mortgage being given as security for the loan constituted a second lien on the property. As it turned out the taxes had not been paid on the property and the mortgage of the Plaintiff was actually subject and subordinate to the prior second mortgage. When the prior second mortgage foreclosed the Plaintiff's mortgage was wiped out and the Plaintiff suffered a total loss of his investment. The representations were obviously material and the damages suffered by the mortgage lender related directly to the matters misrepresented. Contrarty to the situation in *Meyerson*, in this case, the matter allegedly misrepresented was a subordinate interest which was eliminated in the SG mortgage foreclosure and did not result in any loss or damage to SG.

Testimony proffered by SG at the trial shows that at the time SG took title to the property at the foreclosure sale, it had no damages at all. SG acquired the property for a bid of $3,000,000.00 and its total investment at that time was less than $3,000,000.00. SG's argument, through the witness Mangot, that its bid was made on the basis of an income tax consideration is irrelevant. The value of the property is established at the time of the foreclosure sale at not less than the amount bid. This is established law and SG cannot go beyond the date of foreclosure or question the minimum value of the property as being equal to its bid. *Provident National Bank* v. *Thunderbird Assoc.*, 364 So.2d 790 (Fla. 1st DCA 1978); *City Building Corp.* v. *Farish*, 292 F.2d 620 (5th

Cir. 1961). In the *City Building Corp.* case, the Fifth Circuit Court of Appeals stated at page 622:

> "A creditor who causes a debtor's property to be sold, and becomes a purchaser at a judicial sale, stands in the same position at and after the sale of the property as would a stranger whose bid was accepted. *City of Sanford* v. *Ashton*, 131 Fla. 759, 179 So. 765.
>
> Since the creditor acquires the same rights as a high bidding stranger would acquire, it is proper to impose upon it the same duties and obligations as are cast upon a third party successful bidder and to hold it to the amount of its bid."

SG's argument about tax considerations is invalid anyway as pointed out previously on page 6.

The proffered testimony of damages based on the events extending over a four year period subsequent to the foreclosure sale, in addition to being improper for the reasons stated previously, is too remote and speculative to be admitted into evidence and the trial court was correct in sustaining the objection. *Williams* v. *Atlantic Coastline R.R. Co.*, 48 So. 209 (Fla. 1909); *Ballard* v. *Krause*, 248 So.2d 233 (Fla. 2d DCA 1971); *Hall* v. *Western Union Tel. Co.*, 51 So. 819 (Fla. 1910); *F & B Cedo, Inc.* v. *Galaxie Studios, Inc.*, 201 So.2d 597 (Fla. 3d DCA 1967); *Aldon Ind. Inc.* v. *Don Meyers & Assocs. Inc.*, 517 F.2d 188 (5th Cir. 1975).

SG's proffered testimony of damages also suffers from other deficiencies:

a. Mr. Mangot's testimony was not based on matters of which he had personal knowledge.

b. There was no basis shown for the recovery of prejudgment interest. *Nationwide Mutual Insurance*

Co. v. *Griffin*, 222 So.2d 754 (Fla. 4th DCA 1969); *Peter Marich & Assocs. Inc.* v. *Powell*, 365 So.2d 754 (Fla. 2d DCA 1978).

c. There was no causal relationship shown by the evidence between the matter allegedly misrepresented in the claims of damages about which the witness testified.

After the Court ruled that the proffered testimony was inadmissible, SG had no evidence of damages in the case, and elected to rest rather than to proceed on other theories of damages. Therefore, at the conclusion of the Plaintiff's case there was no evidence of damage and the Court properly directed a verdict in favor of CT.

CONCLUSION

It is respectfully submitted that Petitioner has not shown any departure from accepted judicial standards committed by the Trial Court or by the Fifth Circuit Court of Appeals in affirming its Order, and the Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

THOMAS B. DEWOLF
DEWOLF, WARD & MORRIS, P.A.
1475 Hartford Building
200 East Robinson Street
Orlando, Florida 32801
(305) 841-7000

Counsel for Respondent

Certificate Of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 2nd day of July, 1981, by U.S. Mail to Arthur J. Ranson, III, Esquire, 538 East Washington Street, Orlando, Florida, 32801.

/s/ Thomas B. DeWolf
THOMAS B. DEWOLF
DEWOLF, WARD & MORRIS, P.A.
1475 Hartford Building
200 East Robinson Street
Orlando, Florida 32801
(305) 841-7000

Attorneys for Respondent